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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1965

No. 866

JOHN WALSH, Trustee in Bankruptcy for Basic Mining, Inc. (formerly Cauley & Martin, Inc.), Bankrupt,

Petitioner,

vs.

LOCKHART ASSOCIATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 27, 1964, in the appeal numbered and entitled on its docket Nos. 21065 and 21355, John Walsh, Trustee in Bankruptcy for Basic Mining, Inc. (formerly Cauley & Martin, Inc.), Bankrupt, Appellant, v. Lockhart Associates, Appellees.

(a) CITATIONS TO OPINIONS BELOW

None of the opinions delivered by the courts below are not reported; however, they are:

(1) Order of Referee in Bankruptcy in the United States District Court for the Southern District of Florida, Miami Division (Bankruptcy No. 5027), filed July 15, 1963 (R 377 et seq.).

(2) Order of said District Court filed September 5, 1963 reversing Referee (R 384).

(3) Order of said District Court, filed November 8, 1963 (R 394 et seq.).

(4) Opinion of the United States Court of Appeals for the Fifth Circuit, filed November 27, 1964 (R 403 et seq.).

(b) JURISDICTION

(i) The judgment or decree here sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit, filed November 27, 1964 (R 403 et seq.).

(ii) A petition for rehearing was not filed in this cause; however, the issuance of the mandate was stayed by said Court of Appeals for sixty (60) days from December 14, 1964.

(iii) The statutory provision believed to confer on this Court jurisdiction to review said judgment by writ of certiorari is 28 USCA, Sec. 1254 (1).

(c) QUESTIONS PRESENTED FOR REVIEW

This action consists of a claim of the respondents against the bankrupt's estate, represented by the petitioner, said respondents claiming that they are holders in due course of a promissory note in the amount of One hundred and twenty-five thousand ($125,000.00) Dollars, which they acquired by the means hereinafter explained.

The respondents' claim was filed three days late, that is, three days after the expiration of six months following the first date set for the first meeting of creditors, contrary to 11 U.S.C.A. 93(n).

The Referee, who heard the testimony, saw and heard the witnesses and reviewed the evidence, denied this claim. The District Court reversed the Referee by reviewing the evidence and reading the record. The District Court also refused to consider the tardy filing of the claim, despite debtor's objection before the Referee (who allowed the claim to be heard) on the ground that the Referee's allowance of the claim to be filed was not timely sought to be reviewed by the District Court. The petitioner sought to have the District Court and the United States Court of Appeals dismiss the claim on their own motion for late filing. This was refused.

The bankrupt changed its name in a method prescribed by Florida law, from Cauley & Martin, Inc. to Basic Mining, Inc. some days before filing its voluntary petition in bankruptcy. There was no claim by any one that this action constituted fraud on creditors until the Court of Appeals did so of its own motion and so stated in its opinion.

The case was heard on oral argument before the United States Court of Appeals, but without the exhibits (documentary evidence in the case), due to failure of the Clerk in charge of such matters in the District Court to forward the same to the Court of Appeals. Presentation of argument under such circumstances was completely unsatisfactory, and did not afford the petitioner a complete right of appeal to which he is entitled.

The exhibits were finally received by the appellate court subsequent to oral argument and were forwarded to Judge Joe E. Estes, District Judge, at his request prior to entry of the Court's decision. Whether or not the exhibits were reviewed by Judges Jones and Gewin is unknown to the petitioner. However before the decision of the Court of Appeals was issued the petitioner moved the court to rehear oral argument with the exhibits — this was denied. (Appendix E)

Therefore, the questions involved are:

1. Whether respondents were entitled to have their claim considered despite the fact that it was filed three days late, contrary to 11 USCA 93 (n).

2. Whether the Court of Appeals properly concluded that the bankrupt was guilty of fraud by having changed its name some days before filing a voluntary petition in bankruptcy, in view of the fact that no-one claimed such fraud and the record is silent on the subject, nor was the subject of fraud ever considered by the Referee or the District Court.

3. Whether the Court of Appeals properly affirmed

the District Court, which reversed the Referee in his denial of the claim, since the Referee was the trier of the facts, heard the testimony, saw, heard and appraised the witnesses who appeared before him. Neither court stated that the Referee committed a serious mistake of the facts.

4. Whether or not the appellant, (petitioner) who had the right of appeal from the District Court to the Court of Appeals, was properly heard when, through no fault of his, the exhibits (documentary evidence in the case) did not reach the Court of Appeals before oral argument, were not before the Court during oral argument, but were merely sent to the Judge who wrote the opinion before his having issued the same.

(d) STATUTES

"11 USCA §93. Proof and Allowance of Claims * * * *

(n) Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any other state or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, that the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any state or any other subdivision thereof. * * * * *"

(e) STATEMENT OF THE CASE

1. Warren L. Lockhart (referred to as "Lockhart" herein) acted as agent for himself and four others in negotiating for and acquiring the $125,000.00 note claimed upon. These five military officers grouped themselves together for the purposes of this transaction under an agreement dated as of March 1, 1962 (Trustee's Exhibit 2—10/9/62), and are collectively referred to as "Lockhart Associates", respondents here. They thus have asserted a collective claim and are not claimants as individuals.

2. The note claimed upon by Lockhart Associates was part of a complex series of dealings between James T. Benn, (who operates largely in the District of Columbia), and his victim, George W. Martin. The Court is strongly urged to see James T. Benn, Petition, v. Commissioner of Internal Revenue, Respondent, Tax Court of the United States, Docket No. 78019. filed May 1, 1963, and reported in Prentice-Hall as 63,151 P. H. Memo TC Pages 804,829 (opinion) ee seq. The Referee in Bankruptcy, sitting as a trier of facts, saw and heard the witnesses, understood the true story, and denied the claim of Lockhart Associates.

3. George W. Martin (referred to as "Martin" herein) acted in the following sequence of events on behalf of himself, Cauley & Martin, Inc. and William H. Cauley (for the latter by power of attorney, the sufficiency of which the Court has not considered). The corporate name of Cauley & Martin, Inc. was later changed to Basic Mining, Inc., which in October, 1961, became the bankrupt here. The two individuals and the corporation are collectively referred to herein as "Martin Group".

4. The Cauley & Martin note claimed upon was executed by Martin on behalf of the Martin Group on March 9, 1961, payable to the order of Inter-American Products Corporation (herein referred to as "Inter-American"), on or before one year from the date of execution. On the face of said note each of the above named payors is shown as, "Party of the First Part". (Trustee's Exhibit 1). Said note thus clearly refers to the existence of an agreement between the makers and the payee, in which each is required to perform certain acts.

5. The Agreement so referred to is dated March 9, 1961 (Creditor's Exhibit 5), created the $125,000.00 promissory note claimed upon here, and it does not and cannot stand by itself. Paragraph 4-A of that agreement, which Lockhart testified (R 6-7) he examined prior to purchase of the note, incorporates by reference and ratifies two prior agreements between the same parties, as well as a prior-dated letter. The agreement of January 19, 1961 (Creditor's Exhibit 3), so incorporated by reference, recites (at paragraph 2, page 4) the issuance of a note for $160,000.00 by Inter-American Products Corporation payable to George W. Martin, Cauley & Martin, Inc. and William H. Cauley. The maker of the $160,000.00 note was thus the payee of the $125,000.00 note which Lockhart Associates (respondents) obtained.

6. The $125,000.00 note was issued by Martin (for the Martin Group) to Inter-American on March 9, 1961, and it, together with other promissory notes and accounts receivable held by Inter-American Products Corporation, then and there became encumbered together with other assets by the existing $160,000.00 note Inter-American had already given to the Martin Group on January 19, 1961

(Trustee's Exhibit 3 of January 28, 1963). James T. Benn so declared it, "an encumbrance", in his agreement dated October 2, 1961 (Page 3, ¶3 (3) and Page 6, ¶6, Creditor's Exhibit 11). Lockhart Associates saw this agreement before acquiring the $125,000.00 promissory note (R 82). All of this respondents knew before the acquiring of the note. None of the $160,000.00 note has ever been paid. Consequently, the $125,000.00 note was worthless at its utterance. Martin confirmed the fact that the $125,000.00 was merely an offset to the $160,000.00. See his testimony (R 247).

7(a) Lockhart Associates knew of the defense the Martin Group had against the $125,000.00 note because they obtained the note from one Dean A. Boyd, who held the note in his corporation, Golden Bee, which corporation he obtained from James T. Benn with the note, and was an associate of James T. Benn. In the negotiation for the acquisition of the $125,000.00 note, Boyd exhibited a series of documents to Lockhart Associates which Lockhart testified he read before he acquired the note (R 2-11, incl.), and presented these documents at the trial and introduced them in evidence, which were accepted as Creditor's Exhibits 2 to 12, inclusive.

(b) The documents (Creditor's Exhibits 3 to 12, inclusive) include Creditor's Exhibit 11 which, as stated above, describes the $160,000.00 together with other liabilities as an encumbrance (Page 6, ¶6) against the $125,000.00 note and other assets (Page 3, ¶3(e)). In addition, Lockhart saw and read (he so testified R 2) Creditor's Exhibit 3, which described the issuance of the $160,000.00 note, which agreement was incorporated by reference in

Creditor's Exhibit 5, which he also read (R 6-7) which created the $125,000.00 note.

8. The testimony of Lockhart (R 32-33) and Boyd (R 112-113) shows that Lockhart Associates began the negotiation in February of 1962 to purchase the $125,-000.00 note as a result of conferences which they held with Boyd and Benn in an effort to recover investments they made through Boyd resulting in a financial failure totalling some $52,500.00.

9. Lockhart Associates claim to have paid $110,-000.00 for the $125,000.00 note, eight (8) days before maturity; however, they did not deliver money or tangible security but an exchanging of their own notes. They delivered to Boyd the following:

(a) $85,000.00 promissory note dated March 1, 1961.

(b) $25,000.00 promissory note dated March 1, 1961.

(c) On March 12, 1962, exchanged the $25,-000.00 note (b above) for stocks and a check for $885.00 dated March 9, 1962.

(d) A previously agreed credit of $35,000.00 was offset against the $85,000.00 note by a release and offset agreement (Trustee's Exhibit 4 — 10/9/62) from Lockhart to Boyd. This $35,000.00 was an alleged personal indebtedness due from Boyd to Lockhart and not an indebtedness of Golden Bee,

the prior endorsee from whom Lockhart Associates were buying the Martin Group note. Lockhart admitted (R 56) that he had never disclosed to his associates that this $35,000.00 was his only contribution to the enterprise, although their agreement (Court's Exhibit 2 — 10/9/62) on Page 2 lists him as actually paying in $35,000.00.

(e) Boyd's testimony was that the $85,000.00 note, reduced by the above mentioned credit of $35,000.00, and signed by Lockhart and Wigley, had been pledged by Boyd to Benn growing out of Boyd's purchase from Benn of the stock in Golden Bee Corporation (Boyd deposition, R 154 - 157). Thus James T. Benn stands to receive the first money, and perhaps all, that Lockhart Associates might receive as a result of successfully prosecuting claim here on the Martin Group's $125,000.00 note.

10. Golden Bee Corporation had been incorporated in Maryland on December 8, 1961 (see Boyd's Deposition R 128) by Benn, Boyd and a legal secretary as incorporators, but it was not until January 11, 1962 that Boyd bought all the stock from Benn (Boyd deposition, R 140-141). Meanwhile, Benn held the note claimed on by appellees until January 5, 1962, when he placed it in his newly formed Golden Bee Corporation, issuing to himself shares in that corporation for the note (R 133). Whatever infirmities in the note of which Benn had knowledge as individual holder thereof from December 27, 1961 to January 5, 1962, he must have communicated to Golden Bee

when he became sole stockholder of that corporation, which was the last holder of the note before it was transferred "without recourse" to Lockhart Associates.

11. After notice of defenses to the note claimed upon, Lockhart allegedly paid, on August 21, 1962, to Golden Bee $12,500.00 by check (Trustee's Exhibit 5 of October 9, 1962); the Court is earnestly invited to review pages R 97-98.

12. On April 30, 1962, appellees filed their claim before the Referee in Bankruptcy, which was more than six (6) months after first date set for first meeting of creditors which had been October 27, 1961 — thus three days late, prohibited by 11 USCA 93(n).

13. As previously stated, the Referee denied the Lockhart claim, the District Court reversed him and the Court of Appeals affirmed the reversal.

(g) FEDERAL JURISDICTION

The judgment here sought to be reversed is of a Federal Court and the basis for Federal jurisdiction in the Court of first instance is the Federal Bankruptcy Act of 1938 as Amended.

(h) REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

The decision sought to be reviewed issued by the Court of Appeals for the Fifth Circuit, allowing the re-

spondents to file their claim against the bankrupt estate after expiration of the sixth month period after the first date set for the first meeting of creditors, contrary to 11 USCA §93(n), is in direct conflict with the decision issued by the United States Court of Appeals for the Second Circuit, which appears in the case of In re Paragon Novelty Bag Co., C.C.A.N.Y. 1943, 135 F. 2d 210, 52 Am. Bankr. Rep. N.S. 795., in which the Court said:

> "City's application for leave to file claim for taxes against bankrupt's estate was properly denied when not filed within the six months provided by this section, and application for extension of time in which to file claim was not made within the six months.

2.

In the case here sought to be reviewed, the Court of Appeals concluded that the bankrupt having changed its name from Cauley & Martin, Inc. to Basic Mining, Inc. shortly prior to filing its petition for voluntary bankruptcy amounted to fraudulent concealment, and therefore the six months period should not run against them, for fraudulent concealment tolls the statute of limitation and is an equitable doctrine which is read into every Federal statute of limitation. The change of name was accomplished in the manner prescribed by Florida law. It was not an arbitrary change of name. The change of corporate name as well as the bankruptcy proceedings were all matters of public record.

This Court's attention is called to the fact that the respondents never claimed fraudulent concealment in any

of their pleadings below; the Referee never found that there was fraudulent concealment; nor did the District Court. This was a conclusion of the Court of Appeals.

Fraud, if it exists, is a question of fact or a combined question of fact and law, to be determined by a jury or a judge sitting as a trier of the facts — It is not to be concluded by an appellate court which does not have an opportunity to see and hear the witnesses from whom it can form a concept of, "the intent," of persons performing or accomplishing acts which may be in issue in any litigation.

American Jurisprudence, Volume 24, Fraud and Deceit, Page 137, Questions of Law and Fact:

> "§291. Generally — Whether a fraud has been committed ordinarily requires the determination of questions of fact by the jury under instructions, if the case is one tried by a jury, or by the court if the case is tried without a jury. Clearly, an inquiry as to whether a representation was made by the person charged with fraud is one of fact. The same is true in respect of the determination of the falsity of a representation and the existence of other elements of fraud. The credibility of testimony and the weight of conflicting evidence upon an issue of fraud are, of course, questions to be decided by the jury. * * * *"

3.

The Court of Appeals has by far departed from the

accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court that the petitioner calls upon this Court to exercise its power of supervision, because the Court of Appeals affirmed the District Court, which reversed the Referee who sat as a trier of the facts, saw the witnesses, heard their testimony, had an opportunity to determine their credibility, reviewed the evidence, and found that the respondents' claim should be denied. The petitioner submits that, unless the trier of the facts makes findings contrary to the evidence, his findings should not be disturbed. This is true even where a District Judge might have decided otherwise had he sat as trier of the facts, as did the Referee.

It is strongly urged that in this case it is particularly necessary, in order to meet the ends of justice, to allow the trier of the facts to be the sole judge of the facts, because the, "paper work", prepared by James T. Benn is almost perfect, he being an expert in preparation of documents, and the transaction on its face might appear valid and in good faith; but when seeing the respondents and their witnesses, and hearing their testimony, the observer and listener can quickly detect that there was a dishonest scheme involved to wrongfully extract $125,000.00 from the bankrupt estate, and forthwith reach the conclusion, as did the Referee, (one U. S. District Judge granted a new trial in a jury trial where respondents sued Conley personally on this note) that the respondents are not holders in due course.

Federal Rules of Civil Procedure, Rule 52(a):

"Effect. * * * * Findings of fact shall not be

set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court * * * * *"

American Jurisprudence 2d, Volume 5, Appeal and Error, §846, Page 289:

"* * * * * The findings of the referee have been given controlling weight on appeal even where they were not expressly approved by the trial court.

However, the finding of ultimate facts by such a fact-finder appointed by the court is reviewable as to whether it presents a reasonable and correct conclusion from the subordinate facts found and the applicable principles of law. Referees, like juries, may not base their conclusions on guess or speculation but only on reasonable inferences drawn from the evidence, and their findings, even if approved by the trial court, will be accepted on appeal only if the evidence on which they are based is such as to justify a reasonable belief of the probability of the existence of the facts found by them."

Please see Page 8 of Annual Cumulative Supplement, American Jurisprudence, Second Edition, for use to July, 1964, and addition to note 16:

"However, it has been recognized that when

> exceptions to a master's report are sustained by the chancellor, the "manifest weight" rule does not apply and all the facts are open for consideration on review".

The Referee found in Paragraph 7 of his findings of fact (R 381):

> "Thereafter Benn and Boyd began negotiations to dispose of Cauley & Martin Note. On February 9, 1962, they contacted Claimant Lockhart and others who had made other investments which had proven to be unsuccessful with Boyd as broker. Lockhart had lost approximately $30,000.00 and the others, to be associated with him as Lockhart Associates, had lost approximately $25,000.00 on this prior investment (Boyd deposition p. 8 et seq.). After several meetings, Boyd and BENN persuaded Lockhart and the others to purchase the note in question."

The testimony of Lockhart, Wigley and Boyd was that Lockhart (agent and spokesman for appellees) had no dealings with Benn about the $125,000.00 note. However, all the documents examined by Lockhart (Creditor's Exhibits 3, 4, 5, 6, 10, 11 and 12) had Benn's name on them and showed Benn to have a primary party in interest throughout the involved sequence. Since he (Benn) was known and available to Lockhart and Wigley (R 22, 23, 27, 305, 308, 310) they had met at various places including Boyd's home—the alleged seller of the note. The Referee doubtlessly felt that denials by these parties in interest of any contact with Benn was incredible. The District Judge did not have the opportunity to SEE and HEAR the importance of this unacceptable testimony.

It is necessary to further review the evidence and closely consider the Referee's decision, to point out that the respondents had actual knowledge of infirmities in the promissory note claimed upon, and, in addition, to point out that the respondents willfully refused to inquire into the background of the promissory note once they saw all of the, "paper work", that is, contracts, supplements thereto, et cetera, which are all directly connected with the promissory note.

The Referee said in paragraph 7 of his findings (R 381-382):

> " * * * * Creditor's Exhibit #11, paragraphs 3(e) and 6, show the relationship between the $160,000.00 (Trustee's #3) and the $125,000.00 note in question (Trustee's #1). Although the documents indicate many complex transfers and legal relationships, Lockhart Associates did not seek legal advice in the matter (Wigley testimony Tr 69), but relied throughout the transaction upon the advice of Boyd and BENN."

Therefore, the Referee found that the appellees knew of the relationship between the $125,000.00 and the $160,000.00 note, that the $125,000.00 note was encumbered with other assets by the prior existing $160,000.00 note and other obligations. The respondents had Benn, the original actor, and Boyd, the ultimate actor, available to make any and all inquiries and having learned that the $125,000.00 was encumbered (this was an infirmity and defect), nevertheless bought it or otherwise acquired it.

Particular importance is placed on Creditor's Ex-

hibit #11, as it clearly states that the $125,000.00 note, with other assets, was encumbered by a prior dated $160,000.00 note and other obligations. This exhibit was seen by Lockhart before March 1, 1962, that is, before obtaining the note. Creditor's Exhibit #11 entered the evidence when Lockhart, on direct examination, stated: (R 82):

"BY MR. WEKSLER:

Q. Sir, I show you an agreement entered into on the 2nd day of October, 1961, by and between James T. Benn and Troy V. Post, Jr., acting for American Turbo Engine Company, Inc., and ask you whether or not you had seen that agreement prior to March 1, 1962?

A. Yes, sir, I did.

MR. WEKSLER: I offer that into evidence, your, Honor.

THE COURT: Creditor's 11

(Thereupon Creditor's Exhibit #11 was marked and received in evidence this date.)"

The law is well established that to be a holder in due course the holder must obtain the instrument in good faith and without notice of infirmities or equities between prior parties:

American Jurisprudence 2d, Volume 12, Bills and Notes, Page 228, § 1201:

"Taking in good faith and without notice.

The holder of a negotiable instrument is presumed to have acquired it in good faith, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it; that is, without notice of any equities between the prior parties to the instrument, or of facts impeaching the holder's title."

Indeed, when Lockhart reviewed the above mentioned Creditor's Exhibit 11 prior to March 1, 1962 (the $125,000. note was obtained by Lockhart Associates March 1, 1962, and was due March 9, 1962) he, as agent and spokesman for Lockhart Associates, appellees here, obtained full and actual knowledge of certain, "equities between prior parties", that is, that the instrument he was obtaining for himself and others was subject to an encumbrance by virtue of an already existing note in the amount of $160,000. payable to the same persons from whom Lockhart intended to collect the $125,000. In addition, there were installments already due at this time on the $160,000. note and this latter note was not negotiable. It is not payable, "to the order of", anyone; it was payable — "to" — George W. Martin, William H. Cauley, and Cauley and Martin, Inc. (Basic Mining, Inc., the bankrupt). This $160,000. promissory note is Trustee's Exhibit 3 of 1/28/63.

Any supposition that this $160,000. note might have been in the hands of persons other than the original payees and therefore not the subject of an encumbrance on the instrument purchased by Lockhart is not only foolish but impossible, because, as stated above, the $160,000. note was non-negotiable, the payor of the $160,000. note being Inter-

American Products Corporation, which was really the same James T. Benn and available to Lockhart. Inquiry could easily been made as to whether or not this $160,000. or any part thereof had been paid. In brief, Lockhart could not escape the fact that an encumbrance existed against the instrument he was negotiating to obtain. The truth of this matter, upon close and careful examination and study of the facts, will compel the examiner, as was the Referee compelled, to determine and clearly see that Lockhart, Wigley, Benn and Boyd absolutely combined and confederated to wrongfully extract $125,000. from the payors of the instrument in question.

Certainly, this transaction between Lockhart, Wigley, Benn and Boyd was not a normal one. In their haste to complete a transaction before maturity date, they merely exchanged paper among themselves (R 43, 44). It was not until after maturity date that the only money or thing of value (stocks) was paid or delivered (if they did) by Lockhart to Boyd for the note claimed upon (Court's Exhibit 1, dated 3/12/62, R 198).

Again, it is respectfully submitted that the Referee, who saw the witnesses and heard the testimony and was in a position to evaluate the facts of this case, found as follows:

> "10. From the whole of the testimony and from all of the documents in evidence it appears that this transaction is tainted with fraud, for it abundantly appears that neither James T. Benn nor any of his corporations ever intended to fulfill their contractual arrangements or meet their financial obligations in this matter."

Lockhart Associates could have, and should have, made some inquiry as to the background of this promissory note once they had been alerted by the fact that the $125,000. note was subject to an encumbrance or set-off in the amount of $160,000., and it seems clear that legally such inquiry should have been made.

In Walker v. Commercial Credit Co. (Texas 1938), 107 S. W. (2d) 688, the Court quoted from Kaufman Oil Mill et al v. North Texas National Bank in Dallas, 16 S. W. (2d) 143, 145, as follows:

> " * * * * Such facts and circumstances as would be permissible in an ordinary case to show that the purchaser had knowledge of facts that should have put a reasonably prudent man upon inquiry are admissible in evidence as tending to show that the purchaser of a negotiable note had actual knowledge of a defect in the title to such note, or as tending to show the purchaser in taking such note, with knowledge of such facts, acted in bad faith. The question of bad faith, if raised by any evidence, is one of fact for the jury."

Lockhart Associates had the name and address of the payors of the instrument they were negotiating to obtain—it would have been simple indeed to inquire of these payors either by letter, telegram or telephone as to whether or not there were any defects or infirmities in the note, or any equities between the original parties. But Lockhart Associates did not inquire because they did not want to inquire. They merely wanted to obtain the note, in combination with Benn, and Boyd, attempt to clothe themselves as holders in due course, and carry their plan to the

ultimate end, that is, unjustly collect $125,000.00. Again it is stressed that the Referee understood this situation when in his findings in paragraph 9, he stated:

> "Golden Bee Corporation negotiated the Cauley & Martin $125,000.00 note "without recourse" although there were no prior restrictive endorsements, and although the circumstances were unusual, no inquiry was made by Lockhart Associates. The remaining proceeds from the Lockhart $85,000.00 note have been pledged by Golden Bee Corporation or Boyd or both to James T. Benn." (R 383)

It is observed that there were defenses against the $125,000.00 note claimed upon by the respondents, there was failure of consideration, fraud in the procurement, and a set-off since this promissory note, together with other assets, was encumbered by the aforesaid $160,000.00 promissory and other obligations.

The District Court stated in its order (R 384); "that there was a valid consideration for the issuance of the note in question," but failed to point out what constituted the valid consideration in the Court's opinion. At the same time, the District Court in its preamble of the order reversing the Referee stated that the Referee found, "that the entire transaction was tainted with fraud", yet in the commanding portion of the order the characteristic of, "fraud", was not mentioned. Consequently, we must assume that the District Court agreed with the Referee in the fraud aspect found to exist by the Referee, and therefore the District Court has sustained the Referee on his finding of fraud.

Indeed, fraud on the part of Benn is inescapable for, as stated by the Referee in his order denying the claim (R 383), "from the whole of the testimony and from all of the documents in evidence it appears that this transaction is tainted with fraud, for it abundantly appears that neither James T. Benn nor any of his corporations ever intended to fulfill their contractual arrangements or meet their financial obligations in this matter."

In fact, neither Benn nor any of his corporations have ever fulfilled any of their contractual arrangements or met any of their financial obligations in the matter. In view of the foregoing, it is submitted that the defense of fraud does exist and available to the appellant.

It is respectfully submitted that Lockhart Associates, appellees, are not holders in due course and, if they are not, the defense of fraud is available to the appellant Trustee, the effect of which is that appellees do not have good title to the note sued upon:

American Jurisprudence 2d, Volume 12, Bills and Notes, Page 235:

"§1205. Fraud in inception of instrument.

The title of a person who negotiates an instrument is defective where he obtained the instrument, or any signature thereto, by fraud, and, apart from a few cases decided under the law merchant, the authorities are unanimous, both under the law merchant and under the NIL, that the burden rests upon the holder to show that he is a holder in due course, when fraud in the in-

> ception is shown. The presumption that a holder is in due course disappears where there is credible evidence of fraud or of circumstances amounting to fraud. The reason for the rule lies in the presumption that the party guilty of the fraud would be likely to place the instrument in the hands of a holder of that character until the contrary is another person for the purpose of suing upon it. After proof that an instrument was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary is proved.

The defense of set-off is clear on the basis of the note sued upon being subject to a prior existing encumbrance of $160,000.00 as herein explained.

4.

There are many cases where holders in due course are in fact bona fide holders in that category; but when the category is questioned, all of the circumstances and documents which have allegedly led the holder to claim that he is a holder in due course must be carefully examined. These documents, which constituted the exhibits in the case, were not before the Court of Appeals either prior to or during oral argument. The petitioner could not indicate to the Court various points in these documents which form the foundation of bad faith on the part of the respondents of which the petitioner has complained. Believing that these exhibits would be before the Court at the time of oral argument and never having imagined that the Clerk of the lower court would neglect to send them on to the Court of Appeals, the petitioner did not have with him copies of the same for use during oral argument.

This Court's attention is invited to the Certificate appearing in the Appendix (F) over the signature of the Clerk of the Court of Appeals, which establishes that the exhibits were not before the Court of Appeals prior to or during oral argument, but that they were finally received and sent on to Judge Joe E. Estes, who wrote the opinion of the Court; there is no indication that the other two members of the Court saw these exhibits. Judge Joe E. Estes, District Judge, maintains his office at Dallas, Texas, while Judge Warren L. Jones and Judge Walter Pettus Gewin maintain their offices at Jacksonvlle, Florida and Tuscaloosa, Alabama, respectively.

The petitioner has been unable to find any cases which actually meet the circumstances complained of with reference to the unavailability of exhibits prior to and during oral argument. However, it seems clear that where the record on appeal is incomplete, the appellant is not afforded his right of appeal, and thus a new trial may be awarded. In the instant case, it is respectfully submitted that this petition should be granted and the whole case reviewed by this Court.

American Jurisprudence 2d, Volume 5, Appeal and Error, Page 405:

> "§977. Where trial record is lost or inadequate.
>
> In some jurisdictions, it seems to be the settled practice for the appellate court to award a new trial because of a loss of the record, or a part thereof, which would prevent an intelligent review on appeal. In some of the criminal cases in which the courts have been called upon to de-

cide this question, a new trial has in fact been granted as a matter of right and justice, where it appears that the record or a material part thereof, without which the errors assigned "cannot be passed upon, has been lost or destroyed without possibility of substitution through no fault or negligence of the appellant or his counsel, but solely because of the action or negligence of court officials, or by reason of some accident or act of Providence for which no one is responsible. * * * * "

CONCLUSION

WHEREFORE, the petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

Louis A Sabatino
Attorney for Petitioner
923 Alfred I. duPont Building
Miami, Florida

APPENDIX A

ORDER DENYING CLAIM NO. FOUR OF LOCKHART ASSOCIATES

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION. Bankruptcy—No. 5027

In the matter of:

BASIC MINING, INC., (formerly Cauley & Martin, Inc.),

Bankrupt.

This cause came on to be heard before the undersigned Referee in Bankruptcy on the Trustee's objections to the proof of claim of Warren L. Lockhart, Erskine Wigley, Cyril A. Millson, Philip W. Garnett and Clarence J. Lang, operating as, and below called, Lockhart Associates, in the amount of $125,000.00, and the Court having reviewed the record in this cause, fully considered all the evidence, testimony of all witnesses, and heard argument of counsel for the claimants, bankrupt and trustee, the Court makes the following:

FINDINGS OF FACT

1. A promissory note (Trustee's Exhibit #1) in the amount of $125,000.00 was executed March 9, 1961, by the bankrupt, by one George W. Martin and by one William H. Cauley (the latter by power of attorney, the validity of which the Court has not considered), at Washington, D. C., payable to the order of Inter-American Products Corporation (below called "Inter-American"), on or before one year from the date of execution. On the

face of said note (below called "Cauley & Martin note") each of the above named payors is shown as, "Party of the First Part".

2. Prior to the execution of the Cauley & Martin Note, an agreement dated January 19, 1961 (Creditor's exhibit #3) was executed, wherein Inter-American, by one JAMES T. BENN, its sole stockholder and authorized signatory, purchased:

(a) 1,867,590 (68%) shares of stock in Basic Metals & Coal Corporation (below called "Coal Corp.") (not bankrupt); and

(b) $582,921.00 of obligations of Coal Corp., for an agreed consideration of:

(c) its promissory note for $160,000.00 payable to bankrupt, to Martin and to Cauley; and

(d) delivery pursuant to an agreement between parties also dated January 19, 1961 (Trustee's Exhibit 2), of all the capital stock in Key West Propane Gas Corporation, which corporation was represented in said agreement by JAMES T. BENN to have assets available to stockholders valued at approximately $90,000.00.

3. The $160,000.00 note (non-negotiable) referred to in Paragraph 2 (c) above was of doubtful value, since the corporation executing it was insolvent; and the capital stock in Key West Propane Gas Corporation was of doubtful value, the corporation having been adjudicated a bankrupt, Case No. 3156-M, in the United States

District Court, Southern District of Florida, Miami Division, in 1955.

4. Creditor's Exhibit #3 was modified by the parties on March 9, 1961. Creditor's Exhibit #5 provided that the bankrupt, that Martin and Cauley repurchase one-half (½) of the block of stock of Coal Corp. previously sold to Inter-American for $125,000.00, represented by the Cauley & Martin Note, (Trustee's Exhibit No. 1). This price was one-half (½) the total consideration agreed to be paid on January 19, 1961 by Inter-American. This stock was of doubtful value, as it was subject to the $582,921.00 of obligations referred to in Paragraph 2 (b) above.

The two notes and agreements outstanding between the parties, prepared by JAMES T. BENN (Tr. 19, of January 28, 1963) were:

(a) The January 19, 1961 (non-negotiable) note for $160,000.00 (Trustee's Exhibit #3) payable by Inter-American to Bankrupt, Martin and Cauley; and

(b) The Cauley & Martin Note (negotiable for $125,000.00 (Trustee's Exhibit No. 1) payable to the order of Inter-American.

5. Inter-American, through JAMES T. BENN, negotiated the note in question on October 2, 1961, in accordance with an agreement of the same date (Creditor's Exhibit #11), wherein BENN individually agreed to sell the capital stock of Inter-American to American Turbo-Engine Co., Inc. and Hamilton Anderson. The Cauley &

Martin Note was placed in escrow with the Arlington Trust Co. (Creditor's Exhibit #10). The purchasers did not make payment under the purchase contract and the escrow was dissolved on December 27, 1961 (Exhibit 11 attached to Dean A. Boyd's deposition). The Trustee had filed suit to cancel the note in question on December 14, 1961.

6. (a) On January 5, 1962, BENN, having reacquired the note on December 27, 1961, transferred it to Golden Bee Corporation, in exchange for the entire capital stock of Golden Bee Corporation.

(b) JAMES T. BENN transferred the capital stock of Golden Bee Corporation to Dean A. Boyd on January 11, 1962, for a $120,000.00 note secured by a pledge of all that corporation's assets including the Cauley & Martin Note (Trustee's #1).

7. Thereafter BENN and Boyd began negotiations to dispose of Cauley & Martin Note. On February 9, 1962, they contacted Claimant Lockhart and others who had made other investments which had proven to be unsuccessful with Boyd as broker. Lockhart had lost approximately $30,000. and the others, to be associated with him as Lockhart Associates, had lost approximately $25,000. on this prior investment (Boyd deposition p. 8 et seq.) After several meetings, Boyd and BENN persuaded Lockhart and the others to purchase the note in question. Lockhart and some of the others inspected a myriad of legal documents (Creditor's Exhibits #3 to 12 inclusive), constituting the chain of title to the note. Creditor's Exhibit #11 paragraphs 3 (e) and 6, show the

relationship between the $1[illegible]0,000. note (Trustee's #3) and the $125,000.00 note in question (Trustee's #1). Although the documents indicate many complex transfers and legal relationships, Lockhart Associates did not seek legal advice in the matter (Wigley testimony Tr. 69), but relied throughout the transaction upon the advice of Boyd and BENN.

8. Lockhart and the others purchased the $125,000.00 note in question on March 1, 1962 (8 days before maturity) for $110,000.00, represented by two promissory notes of $85,000.00, payable in 60 days, and $25,000.00, payable on 5 days notice. Thereafter, Lockhart Associates, the maker of the notes, came into being (Court's #2) with the date of "organization" as of March 1, 1961. On March 12, 1962, three days after the Cauley & Martin Note became due, the 5-day $25,000.00 Lockhart note was paid by the transfer of certain securities and moneys listed on Court's Exhibit #1. The Lockhart Associates $85,000.00 note to Golden Bee Corporation was reduced $35,000.00 by the forgiveness by Lockhart individually of an alleged indebtedness of Boyd individually. This paper credit from Lockhart to Boyd was Lockhart's only initial contribution to his partnership and toward purchase of Claimant's Note, a fact which Lockhart admitted he had not disclosed to his associates. (Lockhart Tr. 47, Trustee's Exhibit #4, Deposition of Dean A. Boyd, Exhibit 4 attached thereof, page 46; also Trustee's Exhibit #2).

9. Golden Bee Corporation negotiated the Cauley & Martin $125,000.00 note "without recourse" although there were no prior restrictive endorsements, and although the circumstances were unusual, no inquiry was

made by Lockhart Associates. The remaining proceeds from the Lockhart $85,000.00 note have been pledged by Golden Bee Corporation or Boyd or both to JAMES T. BENN.

10. From the whole of the testimony and from all of the documents in evidence it appears that this transaction is tainted with fraud, for it abundantly appears that neither JAMES T. BENN nor any of his corporations ever intended to fulfill their contractural arrangements or meet their financial obligations in this matter.

CONCLUSIONS OF LAW

1. The claimants, Lockhart Associates, are not holders in due course.

2. There was no consideration for the utterance of the Cauley & Martin note.

3. That the objector has sustained the burden of proof herein.

The Court being fully advised in the premises, it is therefore

ORDERED and ADJUDGED that the Claimants' claim be and the same is hereby stricken and denied. It is further

ORDERED and ADJUDGED that said promissory note (Cauley & Martin note) remain in the custody of this Court until further order thereof.

DONE and ORDERED in Chambers in Miami, Dade County, Florida, this 8 day of July, 1963.

J. B. BOOHER,
Referee in Bankruptcy

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.
No. 5027 - Bk - DD

In the Matter of:

BASIC MINING, INC., (formerly Cauley & Martin, Inc.) a Florida corporation,

Bankrupt.

THIS CAUSE came on to be heard on Certificate of Review of and order of the Referee, entered July 8, 1963, denying the claim of petitioners upon a $125,000.00 promissory note, on the grounds the claimants are not holders in due course; that the note had been issued without consideration, and that the entire transaction was tainted with fraud.

The Court has considered the record certified by the Referee, as well as the Referee's Findings of Fact and Conclusions of Law, the argument and briefs of counsel, and is of the opinion that there was a valid consideration for the issuance of the note in question, and that the facts relied upon by the Referee are not sufficient in law to deprive claimants of their status as holders in due coure. The decision of the Referee is therefore reversed and the case remanded to the Referee for further proceedings in accordance with this opinion.

Dated at Miami, Florida, September 5, 1963.

(s) David W. Dyer
Chief Judge

APPENDIX C

ORDER GRANTING MOTION TO STRIKE PORTIONS OF APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND ORDER GRANTING MOTION TO DISMISS PETITION FOR REVIEW

(Number and Title Omitted)

(Filed November 8, 1963)

THIS CAUSE came on to be heard before the Court upon the Motion of Appellees, LOCKHART ASSOCIATES, to strike portions of the Appellant's Designation of Record on Appeal; and after argument of counsel, and it appearing to the Court that the Appellant's Designation of Record on Appeal has enumerated certain items, papers, pleadings, etc., which were not before this Court and were not considered by this Court in the Court's opinion on September 5, 1963, it is,

ORDERED and ADJUDGED as follows:

1. That the Appellees' Motion to Strike Portions of Appellant's Designation of Record on Appeal be, and the same is hereby granted.

2. The following designated items, papers, pleadings, etc. are hereby stricken from the appellant's Designation of Record on Appeal and the Clerk of this Court is directed and informed that the following items are not to be included in the record on appeal:

"V. Petition for Leave to File attached proof of claim (Lockhart Claim).

VI. Objection to Petition for leave to file proof of claim (Lockhart Claim).

VII. Certificate of Referee certifying first meeting of creditors as October 27, 1961, dated October 7, 1963.

VIII. Order of Referee on opinion of District Court, entered October 4, 1963."

THIS CAUSE further came on to be heard upon the motion of LOCKHART ASSOCIATES, Respondents on review, to dismiss the Petition for Review of the Referee's Order dated October 4, 1963; and after argument of counsel and the Court announcing in open court that the Order entered by this Court on September 5, 1963 was a Final Order and that the cause was remanded back to the Referee only for the purpose of entering an appropriate order bottomed on this Court's opinion, and it further appearing to this Court that the Referee, in entering his Order of October 4, 1963, has complied with the order of this Court reversing said Referee; and it appearing to this Court that the Petition for Review is without merit, it is therefore further

ORDERED and ADJUDGED that the Respondents' Motion to Dismiss the Petition for Review be, and the same is hereby granted, and it is further

ORDERED and ADJUDGED that the Referee's Order of October 4, 1963 be, and the same is hereby affirmed.

DONE and ORDERED in Chambers at the United States District Court, Miami, Florida, this 7th day of November, 1963.

s/ David W. Dyer
CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Nos. 21065, 21355

JOHN WALSH, Trustee in Bankruptcy for Basic Mining, Inc. [formerly Cauley & Martin, Inc.], Bankrupt,
Appellant,

versus

LOCKHART ASSOCIATES [Col. Warren L. Lockhart, Col. Erskine Wigley, Col. Cyril A. Milson, (Navy) Captain Phillip W. Garnett, and Col. Clarence J. Lang].
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(November 27, 1964.)

Before JONES and GEWIN, Circuit Judges, and ESTES, District Judge.

ESTES, District Judge: Both of the captioned appeals will be disposed of by one opinion since No. 21355 is nothing but a modal effort by appellant, John Walsh, Trustee, to escape the consequences of his own failure timely to seek review, as provided in 11 U.S.C.A. Sec. 67(c), of an order of the Referee in bankruptcy granting appellees, Col. Warren L. Lockhart and associates, leave to file their proof of claim.

Appellant contends that the trial court erred in find-

ing and concluding that appellees were holders in due course of the $125,000.00 promissory note of Cauley & Martin, Inc. (and William H. Cauley and George W. Martin, individually) dated March 9, 1961, and payable one year from date to the order of Inter-American Products Corporation, which note formed the basis of appellees' claim in bankruptcy. The record fully supports the trial court's conclusions that appellees' note was complete and regular upon its face; that appellees became the holder thereof in good faith and for value, before the note was overdue, and without notice of any infirmity therein or defect in the title of any person negotiating it; and that appellees were holders in due course of said note under Florida Statutes Sec. 674.11. Therefore, appellees hold said note free from defects in title between, or defenses available to, any prior parties among themselves, as asserted by appellant. Florida Statutes Sec. 674.59.

Appellant's further contention that the Referee's order granting leave to file appellees' proof of claim after the 6 months period provided by 11 U.S.C.A. Sec. 93(n) was error, is also without merit.

Appellant did not file a petition to review said order of the Referee within the 10 day period provided in 11 U.S.C.A. Sec 67(c), and he never urged such point until after the District Court had entered its judgment holding that appellees were holders in due course of the note upon which their claim was based.

The bankrupt had changed its corporate name from Cauley & Martin, Inc. to Basic Mining, Inc. only a few days before filing its voluntary petition in bankruptcy; appellees were not scheduled as the holder and owner of

a claim against the bankrupt or of the note in question; and no notice of the bankruptcy proceedings or of the time for filing proofs of claim was given to appellees during such 6 months period, although within said period: the trustee, his attorney and the Referee knew appellees' note was an outstanding obligation of the bankrupt; the trustee had instituted suit to cancel such note in a Delaware State Court, against the original payee and a remote endorser in appellees' chain of title; and the trustee's attorney had received process in a Florida State Court suit instituted by appellees against Cauley & Martin, Inc. to collect on the note. On the very day the 6 months filing period expired (Friday, April 27, 1962), the trustee mailed to appellees an Application for Restraining Order and Notice of Hearing seeking to enjoin appellees from prosecuting their Florida State Court suit on the note. By this application, received after the 6 months period had expired, appellees first learned of the bankruptcy proceedings.

The knowing conduct of the bankrupt, the trustee, his attorney and the Referee with respect to the obligation created by the note in question constituted recognition of a claim upon appellees' note and the presentment thereof, albeit informal, before the expiration of the six months filing period, and made the Referee's formal order granting leave to file the proof of claim tantamount to leave to file an amended claim within the contemplation of the statute.

Had the Referee refused to permit the filing of appellees' proof of claim, a rank fraud would have been practiced upon them. This Court's recent opinion in *Genl. Elec. Co., et al. vs. City of San Antonio, et al.* (5

Cir., 1964), 334 F.2d 480, 483, holding fraudulent concealment tolls the statute of limitations on treble-damage suits under 15 U.S.C.A. Sec. 15, quotes the statement of the Supreme Court in *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 92 L.Ed. 743, 66 S.Ct. 582 (1946), that: "This equitable doctrine is read into every federal statute of limitation."

Having concluded that the record contains no reversible error and that the judgment of the District Court should be affirmed, it is unnecessary for us to pass on appellees' contention that, since they are all officers in the United States Air Force or Navy, 50 U.S.C.A. App. Sec. 525 exempts them from the filing requirements of 11 U.S.C.A. Sec. 93(n).

Appellant's post-argument motion to reset cause for further hearing and argument is hereby DENIED; and the judgment of the District Court is

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Nos. 21065 and 21355

JOHN WALSH, Trustee in Bankruptcy for Basic Mining, Inc. (formerly Cauley & Martin, Inc.), Bankrupt,

Appellant,

vs.

LOCKHART ASSOCIATES,

Appellees.

MOTION TO RESET CAUSE FOR HEARING

TO THE HONORABLE JUSTICES WARREN L. JONES, WALTER PETTUS GEWIN AND JOSEPH EWING ESTES:

The undersigned counsel for John Walsh, Trustee appellant, respectfully submits this motion to reset the above styled cause (two cases) for hearing for the following reasons:

I.

That at the time oral argument was presented in this matter at Jacksonville, Florida, on October 23, 1964, the exhibits in this cause were not before the Court, due to inadvertance on the part of the Clerk of the United States District Court for the Southern District of Florida at Miami.

II.

That in view of the exhibits not having been before this Court, the undersigned was unable to properly present his oral argument to this Court and indicate to the Court the points and matters complained of on appeal.

III.

That the appellant should have the benefit of being heard on appeal with the exhibits before this Court without which, it is submitted, this Court cannot properly evaluate the facts and circumstances evaluated by the trial court (the Referee in Bankruptcy).

WHEREFORE, it is respectfully prayed that this cause be reset for oral argument at a time and place which meets with the convenience of this Honorable Court.

Dated at Miami, Florida, this 2nd day of November, 1964.

Respectfully submitted,

Louis A. Sabatino
Attorney for Appellant
923 Alfred I. duPont Building
Miami, Florida

I certify that a copy of the foregoing motion was mailed to Bernard B. Weksler, Attorney for Appellees, 509 City National Bank Building, Miami, Florida, this 2 day of November, 1964.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Nos. 21065 and 21355

JOHN WALSH, Trustee in Bankruptcy for Basic Mining, Inc. (formerly Cauley & Martin, Inc.), Bankrupt,

Appellant,

vs.

LOCKHART ASSOCIATES,

Appellees.

CERTIFICATE OF COURT

At the request of counsel of record for the appellant,

The Court certifies as follows:

That prior to and when oral argument in this cause was presented to this Court by both counsel for the appellant and counsel for the appellees, the exhibits in this cause were not avialable to either the Court or either of said counsel (nor did either of said counsel, when asked by the Court, have available copy of exhibits at the time of oral argument), in that the deputy clerk of the lower court in charge of such matters failed to forward said exhibits to this Court; however, the exhibits were received by the Clerk of this Court subsequent to presentation of oral argument and were forwarded to Judge Joe E. Estes, District Judge, at his request prior to entry of this Court's decision on November 27, 1964.

Issued at New Orleans, Louisiana on December 28, 1964.

EDWARD W. WADSWORTH, Clerk

By Richard E. Windhorst, Jr.
Deputy Clerk